United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1059

To Be Argued By
ALAN NEIGHER

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1059

UNITED STATES OF AMERICA

Appellee

VS.

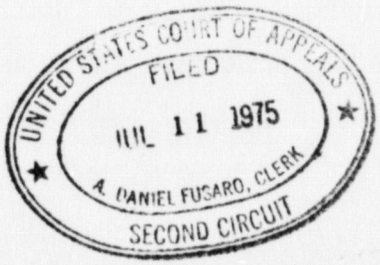
THOMAS JOSEPH HERRMANN

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT - APPELLANT



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I. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE AND CORRECT SENTENCE UNDER 28 U. S. C. §2255

In this appeal, the Government has chosen to contest defendant's motion to vacate and correct sentence under 28 U. S. C. §2255 for the first time, (see Appellee's Brief, p. 5; 98a). The Government does not contest the fact that the previous convictions in issue were invalid, nor does the Government dispute that the sentencing judge considered other assumptions concerning defendant's prior record which were materially untrue. The essence of the Government's argument seems to be (1) that the sentencing judge was correct in simply ruling that the challenged convictions did not affect the sentence, and (2) that the other materially untrue assumptions concerning defendant's history were nevertheless so inconsequential as to justify the sentencing judge ignoring them altogether.[1]

The Government ignores the critical point: notwithstanding the sentencing judge's belief that "the original sentence was fair and

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1.

Judge Clarie, in his ruling on defendant's motion to vacate and correct sentence, acknowledged that defendant had raised the issue of the Court making certain assumptions concerning his criminal record which were materially untrue, 100a, but did not consider this issue in his ruling, 99a-102a.

just" (101a) where the record indicates that the sentencing judge may have been influenced by unconstitutional convictions, United States v. Tucker, 404 U.S. 443, 447-48 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948) or other facts relevant to sentencing, United States v. Malcolm, 432 F. 2d 809, 816 (2d Cir. 1970); McGee v. United States, 462 F. 2d 243 (2d Cir. 1972), due process is not satisfied merely by a post facto justification of the sentence.

The prior invalid convictions and the other misinformation in question are not insignificant. A defendant's prior criminal record is of great importance in determining sentence, United States v. Needles, 472 F. 2d 652, 655 (2d Cir. 1973); United States v. Doyle, 348 F. 2d 715 (2d Cir), cert. denied, 382 U. S. 843 (1965), and the facts surrounding defendant's past criminal record and defendant's family background are logically "facts relevant to sentencing," Malcolm v. United States, supra, 432 F. 2d at 816. The Courts of Appeals are not free to assume that material misinformation did not influence the sentence in question. United States v. Myers, 374 F. 2d 707, 711 (3d Cir. 1967).

It is obvious, therefore, that the constitutional infirmities of defendant's prior record, combined with other misinformation in the presentence report, presented the defendant in "a dramatically different light at sentencing," United States v. Tucker, supra, 404 U.S. at 448, and the original sentence "may have been to some extent influenced" by the factors noted above, McGee v. United States, supra, 462 F. 2d at 246.

Notwithstanding defendant's post conviction opportunity to present rebuttal evidence for the Court's consideration,[2] the damage had already been done. Defendant had been sentenced. Defendant was left an an after-the-fact attempt to convince the sentencing judge that the sentence was improper, over three years after imposition of that sentence, and after memory of the many factors surrounding sentencing had inevitably faded. See United States v. Miller, 361 F. Supp. 825 (W.D.N.C. 1973).

In 1962, Judge Sobelloff told a symposium of the Judicial Conference of this Circuit:

> [I]n no other role can a judge so freely impose a pattern of his personal reactions, philosophy and animosity as when he sentences a man who has no right of appeal though the effect may be his destruction...We allow, and we are the only country that does allow, a single judge to set a minimum sentence at his own dictate. 32 F.R.D. 249 (1962).

Nothing has changed substantially since Judge Sobelloff's address. Judge Kaufman's bill, referred to Senator Hraska, S. 2879, in calling for a limited system of appellate review of sentencing on which Judge Sobelloff focused, remains buried in the obscurity of the Senate Judiciary Committee's files. A single federal judge still sets minimum sentences "at his own dictate."

2.

See defendant's brief, note 6, as to the unavailability in the District of Connecticut of presentence reports to defense counsel at the time of defendant's plea and sentencing.

As Chief Judge Kaufman noted in a recent article on the sentencing process[3] the lack of appellate review of sentences

> has...imposed an undesirable insularity among the judges...forcing them to act unassisted by the accumulated wealth of prior and contemporary opinion upon which they can draw in so many fields. The necessary result has been that individual judges act only within the limits of their own wisdom, which, even at the end of their tenure, does not exceed that of the rest of fallible men.[4]

Given (1) the unreviewable power of district judges to sentence; (2) the insularity of the district judges from external information in the sentencing process; and (3) the defendant "whose life is most acutely affected"[5] this Court's announced concern for scrupulous fairness in the sentencing process cannot be satisfied in this case by the sentencing judge's post facto justification for the original sentence. Defendant should be sentenced on the basis of a presentence report free from reference to invalid prior convictions, United States v. Tucker, supra, 404 U.S. at 447-48; Townsend v. Burke, supra, 334 U.S. 741; and free from material misinformation that may have influenced the sentence, McGee v. United States, supra, 452 F. 2d at 246; United States v. Brown, 479 F. 2d 1170, 1172 (2d Cir. 1973).

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3. Kaufman, Second Circuit Note, 1973 Term, Foreward: The Sentencing Process and Judicial Inscrutability, 49 St. John's L. Rev. 215, 220 (1975).

4. Id. at 221.

5. Id.

This may be accomplished only by remand for resentencing by a different judge, see, e.g. United States v. Brown, 470 F. 2d 285, 288-289 (2d Cir. 1972) on the basis of a new and accurate pre-sentence report.

II. A. THIS COURT MAY CONSIDER DEFENDANT'S RULE 11 CLAIM EVEN THOUGH THIS ISSUE WAS NOT RAISED IN THE COURT BELOW

The Government relies on Fields v. United States, 438 F. 2d 205, 207 (2d Cir. 1971) for the proposition that defendant is procedurally barred from consideration of the merits of his Rule 11 claim. In Fields, this Court ruled that petitioner could not raise for the first time on appeal issues involving knowledge of the nature of the crime charged and the absence of a factual basis for the plea. Unlike the case at bar, Fields involved questions of fact unresolved by the district court. But assuming, arguendo, that Fields involved no fact questions, this Court has not consistently followed its dictum in Fields, and the issue has remained discretionary in this Circuit.

In Foster v. United States, 329 F. 2d 717, 718 (2d Cir. 1964), in a suit for refund of income taxes, this Court considered at length "contentions wholly different from the points raised" in the district court, on the basis that "only a question of law" was involved. See also Kurdziel v. Pittsburgh Tube Company, 416 F. 2d 882, 886 (6th Cir. 1968).

Relief at the appellate stage may be granted when the usefulness of remand is in doubt. In United States v. Badalamento, 507 F. 2d 12, 18 (2d Cir. 1974), this Court held that the Government's non-production of Jencks Act material having importance as a tool for impeachment of a crucial witness against defendant Yagid required reversal, rather than, as the Government contended, remand to the district court

for consideration of the circumstances surrounding and the importance of the material. As in Foster, supra, Badalamente involved questions of law that were not (and probably could not have been) raised in the district court. See also, United States v. Seijo and Hildabrandt, slip op. 3039, 3042 (2d Cir. Ap. 23, 1975).

The Government makes no claim that defendant deliberately withheld grounds for federal collaterial relief, or deliberately abandoned one of his grounds for relief at the December, 1974 hearing in the District Court. See Sanders v. United States, 373 U.S. 1, 17-18, (1963); Ferranto v. United States, 507 F. 2d 408, 409 (2d Cir. 1974).[6]

It is therefore submitted that this Court should consider defendant's Rule 11 claim in the interests of the fair administration of justice. There are no material contested issues of fact which would impede the consideration of the issue. The Government's contention that defendant was a federal, rather than a state, prisoner when his plea was entered will be dealt with in the section below.

6.

The Government's attempt to distinguish Ferranto is somewhat confusing. First, whether or not the petitioner is appearing pro se has nothing to do with whether an appellate court can consider an issue on appeal for the first time. If a remand was required, it would seem that defendant could appear pro se in the District Court as easily as he could appear pro se in the appellate court. Second, despite the government's claim that the issue in Ferranto was included in the petition to the District Court, but was not adjudicated because of summary denial, the decision discloses that Ferranto relied on Tucker v. United States for the first time on appeal. 507 F. 2d at 409.

II. B. THE DISTRICT COURT ERRED UNDER RULE 11, FED. R. CRIM. PRO. IN FAILING TO INFORM DEFENDANT THAT UNDER 18 U.S.C. §3568 THE COURT WAS POWERLESS TO IMPOSE A FEDERAL SENTENCE TO RUN CONCURRENTLY WITH DEFENDANT'S STATE SENTENCE

The Government contends that defendant's Rule 11 argument is based "on the mistaken premise that he was a state prisoner at the time of his guilty plea." Defendant argued in his earlier brief (p. 17) that he was in state custody at the time of his change of plea. Defendant was in fact incarcerated at the Connecticut Correctional facility in Bridgeport at that time (14a) in lieu of federal bond. He had been sentenced earlier on state charges (15a). But irrespective of whose custody - state or federal - defendant was in at the time of his change of plea, the critical factor is that he faced a federal sentence following a state sentence. Defendant was unquestionably in state custody at the time of sentencing (32a), and his federal term could not begin to run until he was received by the federal authorities. United States v. Myers, 451 F. 2d 402, 405 (9th Cir. 1972). The sentencing judge may not have known of defendant's state sentence until after the plea was taken, but the Court was so apprised immediately upon plea (8a), and again prior to sentence via the presentence report (26a), and again at oral argument at sentencing (30a).

The Government's argument that defendant "put himself in a position where his federal sentence could not commence until release

from the state sentence" merely begs the question. The record clearly shows an expectation on the part of defendant and defense counsel that the sentencing judge had the discretion to impose a federal sentence concurrent with the state sentence (30a, 36a-37a). The record further shows no attempt by the sentencing judge or the Government to disabuse defendant or defense counsel of this expectation (9a-17a) 28a-32a, 38a-42a). In light of the record, as in Myers, supra, 451 F. 2d at 405, the defendant "had no reason to know" that the sentencing judge did not have discretion to impose a federal sentence concurrent with state confinement.

The Government argues, relying on Harris v. United States, 493 F. 2d 1213 (8th Cir. 1974), that since defendant's counsel argued for a concurrent sentence, this is "convincing evidence" that defendant was aware of the possibility of consecutive sentencing. The Eighth Circuit in Harris found it unnecessary to reach the issue in Myers, finding that Harris "was fully aware that his sentence could run consecutively with his state sentence." 493 F 2d at 1214. The Court in Harris did not consider the issue of whether Rule 11 is satisfied when the record clearly shows, as here (1) an expectation that the sentencing judge could impose a concurrent sentence, and (2) no knowledge by defendant that the sentencing judge could not impose a concurrent sentence.

Michel v. United States, 507 F. 2d 461 (2d Cir. 1974), cited by the Government as authority for the proposition that defendant "was adequately advised of the direct consequences of his plea" is inapposite to the instant case. Michel claimed that his plea was not voluntary under Rule 11 because he did not understand the meaning of the special parole term imposed, and because he did not understand that, as a resident alien, he was subject to deportation if convicted of a violation of the narcotics laws. The record showed that Michel clearly understood the terms of the special parole term. As to deportation, this Court held that deportation was not one of the direct consequences of the plea as to which the trial judge is required to advise the defendant under Rule 11, and that the sentencing judge "must insure himself only that the punishment that he is meting out is understood." 507 F. 2d at 466. In the instant case, the sentencing court did not meet even this limited Rule 11 standard, since the direct consequences of Herrmann's plea was that the defendant would serve additional years in prison because he clearly lacked an understanding of the length of time he would serve in prison when he pleaded to the federal charge, and no one bothered to tell him.

Despite the Government's assertion that defense counsel was in a better position to advise defendant as to the "indirect consequence" of the guilty plea, two observations are apparent: (1) defense counsel

apparently did not know, on the basis of the record; and (2) any factor that necessarily affects the maximum term of imprisonment, including the time that a federal sentence can commence running, is a direct consequence of the plea within the meaning of Rule 11. United States v. Myers, supra, 451 F. 2d at 404. As the Ninth Circuit held in Myers:

> It is true that the impact of section 3568 is dependent upon a collateral fact, i.e. state confinement, at the time of federal plea and sentencing. In this regard, however, the situation of a defendant such as Myers is not different from that of a defendant who is subject to a recidivist statute which makes the length of imprisonment depend upon the collateral fact of a prior conviction...a plea is not voluntary unless the defendant has been advised of the possibility of enhanced punishment based on his prior offenses. (emphasis added). (Cf. Gannon v. United States (6th Cir. 1953) 208 F. 2d 772; 8 J. Moore, Federal Practice ¶11.03[3]) 451 F. 2d at 404-05.

The Government contends that Myers "would appear to be an aberration with which even the Ninth Circuit is not comfortable in view of the lack of logical distinction between Myers" and Johnson v. United States, 460 F. 2d 1203 (9th Cir. 1972), cert. denied, 409 U.S. 873. The logical distinction between Myers and Johnson is quite apparent. Johnson received consecutive sentences on three charges of murder on an Indian reservation. Johnson was not serving state charges at the time of the federal sentence. As noted above, the Ninth Circuit in Myers noted that unlike the normal sentencing procedure where the defendant would be expected to total the possible consecutive sentences, in the state-federal context, Myers "had no reason to know

that the sentencing judge did not have discretion to determine when the federal sentence would begin nor to impose a federal sentence concurrent with any state confinement." 451 F. 2d at 405.

The remaining cases cited by the Government may be dealt with briefly. The Fifth Circuit in Tindall v. United States, 469 F. 2d 92 (5th Cir. 1972), and the Tenth Circuit in Williams v. United States, 500 F. 2d 38 (10th Cir. 1974) and Wall v. United States, 500 F. 2d 38 (10th Cir. 1974), cert. denied, 95 S. Ct. 504 have simply held that advising defendants that federal sentences could not run concurrently with state sentences are not consequences of the plea required by Rule 11. For the reasons noted above, this rationale is not consistent with the intent of Rule 11 that defendants fully understand the nature and consequences of the plea, and this Court should adopt the Ninth Circuit's holding in Myers.

United States v. Saldana, 505 F. 2d 628 (5th Cir. 1974) and United States v. Vermeulen, 436 F. 2d 72 (2d Cir. 1970) did not involve federal sentences which were to follow state sentences, and those decisions are accordingly inapposite to the case at bar.

CONCLUSION

For all of the reasons set forth herein defendant's guilty plea and sentence May 13, 1971 should be vacated, and defendant should be allowed to plead again to counts one through three of the indictment returned October 29, 1970. At the very least, defendant's sentence should be vacated and his case remanded for resentencing by a different district judge after preparation of a new pre-sentence report by the United States Probation Office.

Respectfully submitted,

July 11, 1975

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief of Defendant-Appellant have been furnished by first class mail, postage prepaid, to: Peter Clark, Esquire, Assistant United States Attorney, 141 Church Street, New Haven, CT. 06511, this 11th day of July, 1975.

Alan Neigher

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